BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEPHEN K. SAYRE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,044,568
STEVEN MOTOR GROUP	)	
Respondent	)	
AND	)	
	)	
WICHITA AUTO DEALERS SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent appeals the January 6, 2011, Award of Review & Modification and the January 10, 2011, Award of Review & Modification Nunc Pro Tunc of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded a permanent partial general (work) disability of 74 percent based on a wage loss of 100 percent and a task loss of 48 percent.

Claimant appeared by his attorney, Dale V. Slape of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kirby A. Vernon of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of Review & Modification and the Award of Review & Modification Nunc Pro Tunc of the ALJ. The record also contains the August 26, 2009 Settlement Hearing transcript and the exhibits attached thereto, including the June 24, 2009, independent medical evaluation (IME) report of Michael H. Munhall, M.D. The Board heard oral argument on April 15, 2011.

ISSUE

What is the nature and extent of claimant's disability? Respondent contends that claimant is not entitled to a review and modification of the running award settlement entered between the parties on August 26, 2009. Respondent contends that claimant has failed to prove either a change in his permanent restrictions or his permanent functional impairment. Therefore, the agreed award of 5 percent to the whole body should remain.

Claimant contends the change in his circumstance stems from the fact he is no longer employed and now has a wage loss of 100 percent. Therefore, the presumption of no work disability in K.S.A. 44-510e is overcome and a work disability under K.S.A. 44-510e would now be appropriate.

FINDINGS OF FACT

Claimant worked as a maintenance carpenter for respondent when, on December 17, 2008, he lost his balance while on a stepladder and fell onto concrete. Claimant suffered injuries to his right hip, arm and shoulder, and his back. The matter was settled on August 26, 2009, by running award and based on a 5 percent whole person functional disability. Both future medical treatment and the right to review and modify the award were left open. Claimant returned to work for respondent with a 50-pound lifting restriction. However, he was able to return to his regular job within that restriction, performing his regular job duties and at the same wage as he was earning on the date of accident.

Claimant continued working for respondent until June 9, 2010. At that time, his employment with respondent ended as he was terminated after having wrecked a vehicle of respondent's for the second time. Both vehicles were provided so claimant could haul his tools around to various job locations. After the second wreck, respondent decided to terminate claimant due to insurance concerns. At the time of claimant's termination, he was performing all of the duties of his job without accommodation.

After his termination, claimant applied for and was receiving unemployment compensation. At the time of the regular hearing, he remained unemployed, although he was still looking for a job, mainly in the construction field. Respondent's owner, Michael Edward Steven, testified that had claimant not been fired because of the vehicle accidents, he would still be working for respondent at his regular job, at the same or greater wages as he was earning at the time of the original accident.

Claimant was originally treated by board certified family practice and sports medicine expert David W. Hufford, M.D., on February 18, 2009. Dr. Hufford diagnosed claimant with a thoracic sprain superimposed on another previous and recent injury.[1] The last time Dr. Hufford examined claimant was on April 29, 2009, at which time he released claimant with a permanent restriction of no lifting over 50 pounds. He rated claimant at 5 percent to the whole person based on the fourth edition of the AMA *Guides*.[2] Dr. Hufford was asked to review a task list prepared by vocational expert Steve Benjamin.

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[1] These other injuries are not explained.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Of the 67 non-duplicative tasks on the list, Dr. Hufford found that claimant was unable to perform 6 for a task loss of 9 percent.

Claimant was referred to board certified physical medicine and rehabilitation specialist Michael H. Munhall, M.D., by his attorney on June 24, 2009. Claimant complained of thoracic or mid-back pain. Dr. Munhall felt that claimant was at MMI from the December 17, 2008, injury. He assessed claimant a 5 percent permanent partial whole body disability based on the fourth edition of the AMA *Guides*.[3] Dr. Munhall examined claimant a second time on June 24, 2010. At that time, claimant's complaints were identical to those found during the 2009 examination.

Dr. Munhall restricted claimant from static or repetitive right trunk rotation; no lift or carry greater than 25 pounds; no pushing and pulling greater than 40 pounds at the waist on an occasional basis; and no more than 10 pounds lifting and carrying; and claimant was to avoid constant pushing or pulling of more than 20 pounds at the waist level. Dr. Munhall determined that claimant had suffered an 87 percent task loss based upon the task list prepared by vocational expert Jerry Hardin.

Claimant was evaluated on July 14, 2010, and again on July 19, 2010, by vocational expert Jerry Hardin at the request of claimant's attorney. Mr. Hardin formulated a list of tasks from claimant's past 15 years of employment. This list was then utilized by Dr. Munhall to determine what, if any, task loss claimant had suffered. Mr. Hardin also found claimant to have a wage loss of 100 percent due to the fact claimant had not found a job since leaving respondent. No additional opinion regarding claimant's ability to earn wages was contained in Mr. Hardin's report.

Claimant was evaluated by vocational expert Steve Benjamin at the request of respondent's attorney on September 1, 2010. Mr. Benjamin also formulated a list of tasks from claimant's last 15 years of employment. That list was then used by Dr. Hufford to determine claimant's task loss. In addition, Mr. Benjamin also determined that claimant retained the ability to earn between $456.80 and $553.20 per week. This would represent a wage loss of between 25 percent and 38 percent.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

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[3] AMA *Guides* (4th ed.).

[4] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

K.S.A. 44-528 states in part:

> (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.
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> (b) If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation.
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> (d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such

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[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 2008 Supp. 44-501(a).

> modification be more than six months prior to the date the application was made for review and modification under this section.[7]

In the August 26, 2009, running award, claimant was awarded a 5 percent whole person functional impairment for the injuries suffered on December 17, 2008. Claimant then continued his employment with respondent, working his regular job without accommodation, until the date of his termination on June 9, 2010. During this period, when claimant was working for wages equal to 90 percent or more of his pre-injury wage, claimant's permanent partial disability compensation was limited by K.S.A. 44-510e(a) to his percentage of functional impairment. After June 9, 2010, this limitation no longer applied and claimant was eligible for a work disability, that is, a permanent partial disability in excess of the percentage of functional impairment. Claimant filed his Application For Review And Modification, Form K-WC E-5, on June 15, 2010. This satisfies the 6-month look-back provision of K.S.A. 44-528(d). Therefore, any modification of this award, if appropriate, will take effect on the date following claimant's termination. The change in this matter stems from claimant's job loss. Claimant's functional impairment remains the same as before. Both Dr. Munhall and Dr. Hufford assessed claimant a 5 percent whole person functional impairment from the original injury.

When claimant was re-examined by Dr. Munhall on June 24, 2010, Dr. Munhall made no mention of an increase in functional impairment. Dr. Munhall did, however, issue work restrictions from the June 24, 2010, examination. No restrictions were listed at the time of the original evaluation on June 24, 2009. The restrictions issued by Dr. Munhall were substantially different from the 50-pound lifting restriction issued by Dr. Hufford on February 18, 2009, the same restriction used by respondent to return claimant to work after the accident.

K.S.A. 44-528 permits the modification of an award in order to conform to changed conditions.[8] If there is a change in the claimant's work disability, then the award is subject to review and modification.[9]

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.[10] Our appellate courts have consistently held that there must be a change of circumstances, either in a claimant's physical or

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[7] K.S.A. 44-528(a)(b)(d).

[8] *Nance v. Harvey County*, 236 Kan. 542, Syl. ¶1, 952 P.2d 411 (1997).

[9] *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

[10] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

employment status, to justify modification of an award.[11] The change does not have to be a change in the claimant's physical condition. It could be an economic change, such as a claimant returning to work at a comparable wage,[12] or losing a job because of a layoff.[13] The burden of establishing the changed conditions is on the party asserting them.[14]

Claimant does not argue that his functional impairment has increased. The argument is that his loss of a job has resulted in a wage loss under K.S.A. 44-510e and K.S.A. 44-528(d). Claimant also points out that the language in K.S.A. 44-528(b) is inapplicable to this situation because modification is not being sought due to the employee returning to work. In fact, this case is just the opposite. Claimant has lost his job with the employer. Therefore, the plain language in K.S.A. 44-528(b) does not apply.

The Kansas Supreme Court, in *Bergstrom*,[15] requires that the fact finder follow and apply the plain language of K.S.A. 44-510e which requires that a post-injury wage loss must be based upon the actual average weekly wage the claimant earned while working, as compared to the average weekly wage the claimant is earning after the injury. Here, claimant is not working and has no income. Therefore, the wage loss difference is 100 percent. In looking at the wage loss, *Bergstrom* says that the statute does not ask why. It merely calculates the loss and applies the resulting number. This review and modification proceeding simply addresses whether claimant's permanent partial disability has increased. As his income loss means claimant no longer is earning 90 percent of his pre-injury average weekly wage, his permanent partial disability is no longer limited to his percentage of functional impairment. His permanent partial disability is defined as follows:

> (a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning

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[11] *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978).

[12] *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997).

[13] *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 372, 899 P.2d 516 (1995).

[14] *Morris*, *supra*, at 531.

[15] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination. The amount of weekly compensation for permanent partial general disability shall be determined as follows:

(1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66 2/3% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;

(2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and

(3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent

> disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto. (Emphasis added.)[16]

Claimant's wage loss has increased from zero to 100 percent. Therefore, the permanent partial disability has increased and a modification is required.

The dissent attached to this decision argues that the language of K.S.A. 44-510e differs from the language of K.S.A. 44-528. The Kansas Supreme Court, recently in *Bergstrom*, eliminated the requirement that a claimant prove good faith in a post-award job search. The Court ruled that, where the language of a statute is clear, it is not the obligation of a court to resort to statutory construction or to speculate as to legislative intent. The language of K.S.A. 44-510e mandates that once an injured worker is no longer earning 90 percent or more of his or her pre-injury average weekly wage, then the measure of disability is the percentage of task loss averaged with the percentage of wage loss. However, there is a statutory distinction between the work disability calculation in K.S.A. 44-510e and the post-award review and modification language in K.S.A. 44-528(b), which asks if the worker is earning or is capable of earning the same or higher wages. If so, the original award may be modified to reduce, or eliminate the Award entirely. However, K.S.A. 44-528(b) is not applicable to the facts of this review and modification proceeding because claimant has not returned to work. This review and modification proceeding is controlled by subsections (a) and (d). Claimant has shown good cause and established that the original award is inadequate and his disability has increased.

The Board has previously concluded that the definition of permanent partial disability in K.S.A. 44-510e applies to pre- and post-award determinations of permanent partial disability.[17] This precise question is not one yet definitely determined by the appellate courts in Kansas since *Bergstrom* was handed down. However, the Court of Appeals did address the issue pre-*Bergstrom*. In *Asay*,[18] the Court was asked to determine if the language in K.S.A. 44-528, dealing with an employee's capability to earn the same or higher wages, altered the test for determining compensable permanent partial general disability under K.S.A. 44-510e. The Court was comparing the claimant's ability to engage in work of the same type and character that he was performing at the time of his injury

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[16] K.S.A. 510e(a).

[17] *Ridgeway v. Exide Technologies*, No. 1,033,067, 2010 WL 5579592 (Kan. WCAB Dec. 30, 2010); *Ramey v. Cessna Aircraft Company*, No. 5,018,001, 2010 WL 3489664 (Kan. WCAB Aug. 11, 2010); *Serratos v. Cessna Aircraft Company*, No. 1,024,584, 2010 WL 1445593 (Kan. WCAB Mar. 25, 2010).

[18] *Asay v. American Drywall*, 11 Kan. App. 2d 122, 715 P.2d 421 (1986).

(the then effective test for work disability) to the language of K.S.A. 44-528. The Court determined that the language of K.S.A. 44-528 did not justify cancellation of an award unless the claimant had regained the "ability . . . to engage in work of the same type and character that he was performing at the time of his injury." The Court also determined that the specific language of K.S.A. 44-510e, which had been modified in 1974, trumped the older general language in K.S.A. 44-528, ruling that "where there is a conflict between two statutes which cannot be harmonized, the later legislative expression controls."[19] Morever, the capacity test in K.S.A. 44-528(b) only applies when a claimant has returned to work post award, which clearly is not the situation in this case. Here, neither party is seeking to have the award reduced or cancelled.

The Board finds that the definition of permanent partial disability in K.S.A. 44-510e controls in this matter over the general language in K.S.A. 44-528 and reflects the legislature's most recent expression of its intent on how permanent partial general (work) disability awards are to be computed. Thus, the test is claimant's actual wage earnings, pre-award and post award, and not his capability to earn the same or higher wages.

In this instance, as claimant has been unemployed since his termination, his wage loss is 100 percent. Both Dr. Hufford and Dr. Munhall provided task loss opinions in this matter. The ALJ determined that the true test of claimant's task loss lies somewhere in between their opinions and assessed claimant a task loss of 48 percent. The Board finds that the analysis of the ALJ is well supported and affirms the average of the wage loss and task loss findings for a permanent partial general disability of 74 percent.

It is worth noting that the dissent's interpretation of K.S.A. 44-528(b) would, in effect, cause inconsistent and illogical results. For example, under that interpretation, an injured employee, who returned to work at an accommodated position and, thereafter, entered into an agreed award, but was later terminated, would not be entitled to an increase in his or her permanent partial general disability from functional impairment to a work disability under K.S.A. 44-510e, but would be limited to benefits already received because, as here, he or she had demonstrated that he or she is "capable of earning the same or higher wages". In contrast, a similarly situated worker, who was injured but had yet to receive any award, agreed or otherwise, but was terminated, would unquestioningly be subject to the work disability analysis provided for in K.S.A. 44-510e. His or her work disability would be based upon an average of his or her actual wage loss and task loss without regard to his or her capacity to earn wages. Thus, similarly situated claimants would receive potentially greatly differing results based solely upon the timing of the disposition of their claims.

Such a vast financial difference in the outcome might well give inappropriate incentive to employers to terminate an employee immediately after an award was issued and, in turn, apply for review and modification under K.S.A. 44-528 to take advantage of

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[19] *Id*. at 126.

the different wage loss analysis. This would be against the stated purpose of the Workers Compensation Act (Act), namely to return employees to work at a comparable wage.[20]

In sum, in a review and modification proceeding, a claimant's permanent partial disability may be reviewed and modified by applying the definition of permanent partial disability contained in K.S.A. 44-510e. When a claimant is no longer earning 90 percent or more of his or her pre-injury average weekly wage, that statute requires the actual wage loss and task loss be averaged, with the numerical result being the work disability. The decision by the ALJ to increase claimant's award to a permanent partial general disability award of 74 percent is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of Review & Modification and the Award of Review & Modification Nunc Pro Tunc of the ALJ should be affirmed.

The Award of Review & Modification and the Award of Review & Modification Nunc Pro Tunc set out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Review & Modification and the Award of Review & Modification Nunc Pro Tunc of Administrative Law Judge John D. Clark dated January 6, 2011, and January 10, 2011, respectively, should be, and are hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Stephen K. Sayre, and against the respondent, Steven Motor Group, and its insurance carrier, Wichita Auto Dealers Self Insurance Fund, for an accidental injury which occurred on December 17, 2008, and based upon an average weekly wage of $740.50.

Claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of $463.69 per week (based upon the Settlement of August 26, 2009) totaling

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[20] *Farrell v. U.S.D. No. 229*, 26 Kan. App. 2d 797, 995 P.2d 881 (1999).

$9,621.78[21] for a 5 percent permanent partial whole body functional disability, followed by permanent partial disability compensation at the increased rate of $493.69 per week for a 74 percent permanent partial general disability, for a total award not to exceed $100,000.00.

As of April 25, 2011, there is due and owing to claimant 20.75 weeks of permanent partial disability compensation at the rate of $463.69 per week totaling $9,621.78, plus 101.96 weeks of permanent partial disability compensation at the rate of $493.69 per week in the sum of $50,336.63, for a total due and owing of $59,958.41, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $40,041.59 shall be paid at the rate of $493.69 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the award of the majority. K.S.A. 44-528 is specific in directing the method of determining whether a modification of an award is proper. The statute requires a determination of an employee's capability to earn equal or greater wages than that being earned at the time of the accident. The Kansas Supreme

[21] The benefit rate of $463.69 is based upon an AWW of $695.50. (See Worksheet For Settlement for the August 26, 2009, Settlement Hearing.)

Court, in an opinion which sent shock waves through the workers compensation bar in Kansas, was very specific in *Bergstrom*[22] in determining that the Court's obligation is to give effect only to express statutory language, rather than speculating on what the law should or should not be. The Kansas Court of Appeals, more recently, when discussing *Bergstrom* in *Tyler*[23], noted that judicial notions regarding the legislature's intent in the enactment of K.S.A. 44-510e(a) are not favored. The Court in *Tyler* went on to warn that "[j]udicial blacksmithing will be rejected even if such judicial interpretations have been judicially implied to further the perceived legislative intent."[24]

The legislative intent contained in K.S.A. 44-528 requires a determination as to whether a claimant is capable of earning the same or higher wages as those being earned on the date of accident. Here, claimant had the ability to return to an accommodated job with respondent, earning the same wages and receiving the same fringe benefits, and, in fact, did so for a significant period of time. The only thing preventing this currently is the termination of claimant's job with respondent. Claimant's earning "capability" is not in dispute with regard to his accommodated job with respondent. In this instance, claimant had returned to work with respondent earning a comparable wage, performing his regular job.

Even under *Asay*[25], cited by the majority, this claimant retains the "ability . . . to engage in work of the same type and character that he was performing at the time of his injury."[26] Additionally, the version of K.S.A. 44-510e in effect at the time of the *Asay* decision is decidedly different from the current version of the statute. In 1986, the legislative mandate was to determine "the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced. . . ." In 1993, this language was changed to the current version requiring an average of the wage loss and task loss suffered by the employee. This represented a major modification of K.S.A. 44-510e. Of note, K.S.A. 44-528 was also modified in 1993 to allow a determination by the "administrative law judge", rather than the director, of the employee's capacity to earn the same or higher wages than the employee did at the time of the accident. The specific language regarding the employee's ability to earn the same or greater wages with either the respondent at the time of the accident, or from any trade or employment, was allowed to remain. Had the legislature intended for K.S.A. 44-510e to "trump" K.S.A. 44-528, the perfect time to do so

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[22] *Bergstrom, supra.*

[23] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[24] *Id.*, at 391.

[25] *Asay*, *supra*.

[26] *Id.*, at Syl. ¶ 4.

would have been with the 1993 modifications of both statutes. The fact that the legislature allowed the language in K.S.A. 44-528 to remain should send a strong signal to the courts of Kansas as to its "intent".

Additionally, in *Asay*, the Court was proceeding under the old standard of the liberal construction of the Act to award compensation where it is reasonably possible to do so. That case law standard was changed by the legislature in 1987 to require a liberal construction of the statute to bring employers and employees within the provisions of the Act, but to then apply the provisions of the Act impartially to both.[27]

The majority cites *Bergstrom* in support of its position that the plain language of K.S.A. 44-510e outweighs that of K.S.A. 44-528. The Supreme Court, in *Bergstrom*, identifies as a "most fundamental rule of statutory construction" that the intent of the legislature governs if that intent can be ascertained.[28] Here, the specific language of K.S.A. 44-528 is clear. It has been allowed to remain intact for decades, while K.S.A. 44-501e has been modified multiple times. It is hard to imagine a more clear legislative intent.

The majority argues that this dissent would result in an inequitable treatment of workers who suffer a job loss before an award versus after an award has been entered. The possibility of differing results with similarly situated claimants may be the effect, with that outcome being arguably inappropriate. The fact that a legislatively created statute may result in inappropriate or even ludicrous consequences is not controlling. In *Saylor*[29], the Kansas Court of Appeals allowed a date of accident, determined under K.S.A. 44-508(d), to occur while an injured claimant was home recuperating from knee surgery. How inappropriate to allow a date of accident to occur weeks or even months after an employee ends his or her employment. Nevertheless, that is exactly the result with K.S.A. 44-508(d) and the new date of accident determinations when dealing with microtrauma injuries. The change from the original bright-line rule of the last day worked[30] to the express language of K.S.A. 44-508(d) creates a presumption that the legislature intended to change the date of injury determination. As noted in *Saylor*, legislative intent as expressed in the language of the statute controls. In this instance, the legislature's determination that the language of K.S.A. 44-528 should remain unchanged displays its clear intent.

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[27] K.S.A. 44-501(g).

[28] *Bergstrom*, *supra*, at 607.

[29] *Saylor v. Westar Energy, Inc,* 41 Kan. App.2d 1042, 207 P.3d 275 (2009).

[30] *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

Finally, it is noted that K.S.A. 44-528 says "may" rather than "shall" in discussing the power of an administrative law judge to modify an award. This Board Member agrees that the statute says "may". However, under the analysis of the majority, the end result would not be "may", but would, instead, be "never".

The very specific language of K.S.A. 44-528 should apply to this matter and claimant should be found to have retained the capacity to earn the same or higher wages as were being earned at the time of the accident. Claimant should be limited to his functional impairment pursuant to K.S.A. 44-528 and denied additional permanent partial general disability under K.S.A. 44-510e.

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge